

DEPARTMENT OF HOMELAND SECURITY

8 CFR Part 217

RIN 1601-AA54

Additional Countries Designated for the Visa Waiver Program

AGENCY: Office of the Secretary; DHS.

ACTION: Final rule; technical amendment.

SUMMARY: Citizens and eligible nationals of participating Visa Waiver Program countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. This rule adds the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic to the list of countries authorized to participate in the Visa Waiver Program.

DATES: This final rule is effective on [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Marc Frey, Department of Homeland Security, Office of Policy, (202) 282-9555.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

A. The Visa Waiver Program

Pursuant to section 217 of the Immigration and Nationality Act (INA), 8 U.S.C. 1187, the Secretary of Homeland Security (the Secretary), in consultation with the Secretary of State, may designate certain countries as Visa Waiver Program (VWP) countries if certain requirements are met. Those requirements include, without limitation, (i) meeting the statutory rate of nonimmigrant visa refusal for nationals of the country, (ii) a government certification that it has a program to issue machine readable, tamper-resistant passports that comply with International Civil Aviation Organization (ICAO) standards, (iii) a U.S. government determination that the country's designation would not negatively affect U.S. law enforcement and security interests, (iv) government agreement to report, or make available to the U.S. government information about the theft or loss of passports, (v) the government accepts for repatriation any citizen, former citizen, or national not later than three weeks after the issuance of a final order of removal, and (vi) the government enters into an agreement with the United States to share information regarding whether citizens or nationals of that country represent a threat to the security or welfare of the United States or its citizens.

Section 711 of the Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266, 338 (Aug. 3, 2007) (the 9/11 Act), authorizes the Secretary to expand the VWP to additional countries by waiving the low nonimmigrant visa refusal rate requirement. See 8 U.S.C. 1187(c)(8). To waive the low nonimmigrant visa refusal rate requirement, the Secretary of Homeland Security must

certify to Congress that: (i) the Electronic System for Travel Authorization (ESTA) is “fully operational,” and (ii) an air exit system is in place that can verify the departure of not less than ninety-seven percent of foreign nationals who exit through U.S. airports. Those certifications have been made. To qualify for a waiver under 8 U.S.C. 1187(c)(8), a country must: (i) meet all of the security requirements of the statute; (ii) the Secretary of Homeland Security determines that the totality of the country’s security risk mitigation measures provide assurance that the country’s participation in the VWP would not compromise the law enforcement, security or immigration enforcement interests of the United States; (iii) there has been a sustained reduction in the rate of refusals for nonimmigrant visas for nationals of the country and conditions exist to continue such reduction; (iv) the country cooperated with the U.S. government on counterterrorism initiatives, information sharing and preventing terrorist travel before the date of its designation as a program country and the Secretaries of Homeland Security and State determine that such cooperation will continue; and (v) the rate of refusals for nonimmigrant visitor visas during the previous full fiscal year was not more than ten percent or the visa overstay rate for the previous full fiscal year does not exceed the maximum visa overstay rate, once such rate is established. See 8 U.S.C. 1187(c)(8)(B).

The INA also sets forth requirements for continued eligibility and, where appropriate, termination of program countries.

Citizens and eligible nationals of VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory

requirements. The designated countries in the VWP include Andorra, Australia, Austria, Belgium,¹ Brunei, Denmark, Finland, France, Germany, Iceland, Ireland, Italy, Japan, Liechtenstein, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, San Marino, Singapore, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom². See 8 CFR 217.2(a).

To travel to the United States under the VWP, an alien must be from a participating country and must (1) be seeking entry as a tourist for 90 days or less, (2) be a national of a program country, (3) present an electronic passport or a machine readable passport issued by a designated VWP participant country to the air or vessel carrier before departure;³ (4) execute the required immigration forms, (5) if arriving by air or sea, arrive on an authorized carrier, (6) not represent a threat to the welfare, health, safety or security of the United States, (7) have not violated U.S. immigration law during a previous admission under the visa waiver program, (8) possess a round trip ticket; and (9) waive the right to review or appeal a decision regarding admissibility or to contest other than on the basis of an application for asylum, any action for removal. See Section 217(a) of the Immigration and Nationality Act (INA), 8 U.S.C. 1187(a). See also 8 CFR part 217.

¹ After May 15, 2003, citizens of Belgium must present a machine-readable passport in order to be granted admission under the Visa Waiver Program.

² The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries.

³For countries designated as VWP member countries prior to November 17, 2008, passports issued before October 26, 2006, need not contain the electronic chip that includes the biographic and biometric information of the passport holder provided the passports comply with International Civil Aviation Organization machine readable standards.

DHS, in consultation with the Department of State (DOS), has evaluated the countries of the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic for VWP designation to ensure the country meets the requirements set forth in section 711 of the 9/11 Act and section 217 of the INA. The Secretary has determined that these countries have satisfied the statutory requirements to be VWP countries; therefore, the Secretary, in consultation with the Secretary of State, has designated these countries as eligible for the VWP.⁴

This final rule adds the Czech Republic, Estonia, Hungary, Latvia, Lithuania, the Republic of Korea, and the Slovak Republic to the list of countries authorized to participate in the VWP. Accordingly, beginning [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], citizens and eligible nationals from these additional VWP countries may apply for admission to the United States at a U.S. port of entry as nonimmigrant aliens for a period of ninety days or less for business or pleasure without first obtaining a nonimmigrant visa, provided that they are otherwise eligible for admission under applicable statutory and regulatory requirements. Each new member country has agreed that its citizens must obtain an approved travel authorization from U.S. Customs and Border Protection (CBP) via the Electronic System for Travel Authorization and must possess a valid electronic passport. For more information about the Electronic System for Travel Authorization program, please see the interim final rule at 73 FR 32440.

⁴ On November 14, 2008, the Secretary of State nominated these countries for membership in the VWP.

III. STATUTORY AND REGULATORY REQUIREMENTS.

A. Administrative Procedure Act

This final rule merely lists those countries that the Secretary of Homeland Security, in consultation with the Secretary of State, has designated as VWP eligible countries in accordance with 8 U.S.C. 1187(c). This final rule neither imposes additional burdens on, nor takes away any existing rights or privileges from, the public. Therefore, pursuant to 5 U.S.C. 553(b)(B), notice and comment procedures are unnecessary. For the same reasons, pursuant to 5 U.S.C. 553(d)(3), a delayed effective date is not required.

This final rule is also excluded from the rulemaking provisions of 5 U.S.C. 553 as a foreign affairs function of the United States because it advances the President's foreign policy goals, involves bilateral agreements that the United States has entered into with participating VWP countries, and directly involves relationships between the United States and its alien visitors. Accordingly, DHS is not required to provide public notice and an opportunity to comment before implementing the requirements under this final rule.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 603(b)), as amended by the Small Business Regulatory Enforcement and Fairness Act of 1996 (SBREFA), requires an agency to prepare and make available to the public a regulatory flexibility analysis that describes the effect of a proposed rule on small entities (i.e., small businesses, small organizations, and small governmental jurisdictions) when the agency is required "to publish a general notice of proposed rulemaking for any proposed rule." Because this

rule is being issued as a final rule, on the grounds set forth above, a regulatory flexibility analysis is not required under the RFA.

DHS has considered the impact of this rule on small entities and had determined that this rule will not have a significant economic impact on a substantial number of small entities. The individual aliens to whom this rule applies are not small entities as that term is defined in 5 U.S.C. 601(6). Accordingly, there is no change expected in any process as a result of this rule that would have a direct effect, either positive or negative, on a small entity.

C. Unfunded Mandates Reform Act of 1995

This rule will not result in the expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100 million or more in any one year, and it will not significantly or uniquely affect small governments. Therefore, no actions were deemed necessary under the provisions of the Unfunded Mandates Reform Act of 1995.

D. Executive Order 12866

This amendment does not meet the criteria for a “significant regulatory action” as specified in Executive Order 12866.

E. Executive Order 13132

The rule will not have substantial direct effects on the States, on the relationship between the National Government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with section 6 of Executive Order 13132, DHS has determined that this final rule does not have sufficient federalism implications to warrant the preparation of a federalism summary impact statement.

F. Executive Order 12988 Civil Justice Reform

This rule meets the applicable standards set forth in sections 3(a) and 3(b)(2) of Executive Order 12988.

LIST OF SUBJECTS

8 CFR part 217

Air carriers, Aliens, Maritime carriers, Passports and visas.

AMENDMENTS TO THE REGULATIONS

For the reasons stated in the preamble, DHS amends part 217 of title 8 of the Code of Federal Regulations (8 CFR part 217), as set forth below.

PART 217—VISA WAIVER PROGRAM

1. The general authority citation for part 217 continues to read as follows:

Authority: 8 U.S.C. 1103, 1187; 8 CFR part 2.

2. In section 217.2 the definition of the term “Designated country” in paragraph (a) is revised to read as follows:

§ 217.2 Eligibility.

(a) * * *

Designated country refers to Andorra, Australia, Austria, Belgium, Brunei, Czech Republic, Denmark, Estonia, Finland, France, Germany, Hungary, Iceland, Ireland, Italy, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Monaco, the Netherlands, New Zealand, Norway, Portugal, Republic of Korea, San Marino, Singapore, Slovak Republic, Slovenia, Spain, Sweden, Switzerland, and the United Kingdom. The United Kingdom refers only to British citizens who have the unrestricted right of permanent abode in the United Kingdom (England, Scotland, Wales, Northern Ireland, the Channel Islands and

the Isle of Man); it does not refer to British overseas citizens, British dependent territories' citizens, or citizens of British Commonwealth countries. After May 15, 2003, citizens of Belgium must present a machine-readable passport in order to be granted admission under the Visa Waiver Program.

Dated: November 7, 2008.

Michael Chertoff,
Secretary.

[FR Doc. 2008-27062 Filed 11/14/2008 at 8:45 am; Publication Date: 11/17/2008]